SUPERINTENDENT OF LANDS AND SURVEYS, 4TH DIVISION & ANOR.

v.

HAMIT B. MATUSIN & 6 ORS.

SUPREME COURT, KUCHING
DATO' PEH SWEE CHIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ,
TUAN CHARLES HO J.
[CIVIL APPEAL NO. 01-19-91]
21 JULY 1994

PRACTICE & PROCEDURE: Pleading - Defendants' evidence at variance with pleading - Whether to be disregarded - RHC O. 18 rr. 7(1), 8(1).

PRACTICE & PROCEDURE: Pleading - Defendants' evidence at variance with pleading - Objection to admissibility - Whether plaintiffs taken by surprise - Whether evidence a radical departure from pleading - Whether evidence a mere development of what was alleged in pleading.

PRACTICE & PROCEDURE: Pleading - Evidence at variance with pleading - Objection to admissibility - Objection raised only at submission stage - Whether too late - Whether amounted to waiver.

The respondents in this case claimed for an injunction to restrain the appellants from building on certain parcels of lands in which they claimed to have acquired native customary rights under the provisions of the Sarawak Land Code. In their respective defence the appellants denied the respondents' claim to such rights but this denial, as shown by the pleadings, was only a bare denial devoid of any reasons or any further particulars whatsoever.

At the trial the appellants highlighted in the evidence the reasons for their denial which they did not plead, namely, that the said lands were situated within a river bank reserve on which no one could claim any title by virtue of the said Land Code and secondly, that the said lands belonged to Sarawak Shell Oil Ltd at one time. There was then no objection by the respondents. However, at the conclusion of all evidence and when the trial had reached the stage for final submission, the respondents for the first time raised an objection saying that such defences of the appellants were not pleaded and therefore ought to be disregarded. The learned Judge agreed and while ruling that the appellants were in breach of O. 18 r. 7(1) Rules of the High Court, ruled further that such non-compliance was not merely technical in nature and on that ground disregarded the evidence.

The appellants appealed and the primary issues that arose were:

(1) Whether the evidence in question, in the circumstances, took the respondents by surprise or in any way prejudiced, misled or embarrassed the respondents.
(2) Whether the evidence in question represented a radical departure from the pleadings or whether it was a mere variation, modification or development of what was alleged in the pleadings.
(3) Whether by allowing the appellants to adduce the evidence without any objection until such a late stage and not objecting to the evidence as and when the evidence emerged, the respondents were deemed to have waived the impropriety of admitting such evidence.

Held:

[1] It is not sufficient for the appellants to merely plead a denial of the acquisition of native customary rights as claimed by the respondents without stating the reasons therefor. The two alleged defences which the appellants raised in evidence at the trial, being material facts, in the circumstances of this case, ought to have been pleaded and failure to do so would make their said evidence objectionable at the option of the respondents.

[2] The rule is that if a party is taken by surprise by evidence which departs from pleaded material facts, he must object then and there at the point of time when such evidence emerges, in order for such evidence to be disregarded by the Court. It will be too late when it is objected to later on, as in the final submission at the close of the evidence, as happened in the instant case. Acceptance by the Court of such late objection would result in the party adducing such evidence to face the great risk of being denied leave to amend his pleading in question at that stage.

[3] The respondents, by failing to object in time, cannot be said to have been taken by surprise, or prejudiced, misled or embarrassed by the evidence of the appellants. The correspondence between the parties also indicated that irrespective of the bare denial the respondents were aware of the nature of the defence. If they were really in doubt they could have resorted to asking for further and better par-

ticulars under O. 8 r. 12 RHC. The fact that they chose to proceed with the hearing without taking such initiative shows that they were in no way prejudiced or surprised by the more specific evidence raised by the appellants at the hearing.

[4] Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading by way of waiver unless the evidence represents a radical departure from the pleading and not just a variation, modification or development of what was alleged therein. In the instant appeal the evidence in issue is not such a radical departure but a mere development of what has been alleged by the defendant. It follows that the respondents, by allowing the appellants to give the evidence in question without any objection until such a late stage, must be deemed to have waived the impropriety of admission of such evidence

[5] What the lower Court ought to enquire when the respondents failed to object when the evidence in question was adduced was whether the evidence is such a radical departure from the pleading or whether it is a mere variation, modification or a development thereof. However with the learned Judge declining to consider at all the evidence bearing on the two alleged defences, this Court is deprived of an opportunity of considering the learned Judge's conclusion and the reasons therefor on such alleged defences. As such alleged defences being by no means shadowy ones, a retrial would therefore be necessary.

[Appeal allowed. Order accordingly].

[Bahasa Malaysia Translation of Headnote]

AMALAN & PROSEDUR: Pliding - Keterangan defendan bertentangan dengan pliding - Samada hendak diabaikan - KMT A. 18 kk. 7(1),8(1).

AMALAN & PROSEDUR: Pliding - Keterangan defendan bertentangan dengan pliding - Bantahan terhadap penerimaan - Samada Plaintif terkejut - Samada keterangan merupakan penyimpangan radikal daripada pliding - Samada keterangan hanya kemajuan dari apa yang telah dikatakan dalam pliding.

AMALAN & PROSEDUR: Pliding - Keterangan yang bertentangan dengan pliding - Bantahan terhadap penerimaan - Bantahan hanya diperingkat penghujahan - Samada terlalu lambat - Samada membawa kepada pengenepian.

Responden dalam kes ini menuntut injunksi untuk menghalang perayu daripada mendirikan atas bidang-bidang tanah yang tertentu dalam mana mereka menuntut telah memperolehi hak-hak adat anak watan di bawah peruntukan Kanun Tanah Sarawak. Dalam pembelaan mereka masing-masing perayu telah menafikan tuntutan responden kepada hak-hak yang sedemikian tetapi penafian ini, seperti yang telah ditunjukkan oleh pliding-pliding adalah hanya penafian tidak berasas tanpa apa-apa alasan atau sebarang butir-butir apa jua pun yang selanjutnya.

Di perbicaraan perayu-perayu telah menekankan dalam keterangan alasan-alasan bagi penafian mereka yang mana mereka tidak memplidkan, iaitu, bahawa tanah-tanah tersebut terletak dalam rizab tebing sungai ke atas yang mana tiada siapa pun yang boleh menuntut sebarang hakmilik menurut Kanun Tanah tersebut dan keduanya, bahawa tanah-tanah tersebut adalah pada satu masa dahulu merupakan kepunyaan Sarawak Shell Oil Ltd. Pada ketika itu tidak terdapat bantahan oleh responden. Walaubagaimanapun, pada kesimpulan kesemua keterangan dan apabila perbicaraan mencapai peringkat penghujahan muktamad, responden-responden telah pada pertama kalinya menimbulkan bantahan dengan menyatakan bahawa pembelaan sedemikian oleh perayu-perayu telah tidak diplidkan dan dengan itu haruslah diketepikan. Tuan Hakim yang bijaksana telah bersetuju dan ketika memutuskan bahawa perayu-perayu tersebut telah memungkiri A. 18 k. 7(1) Kaedah-Kaedah Mahkamah Tinggi, memutuskan selanjutnya bahawa ketakpatuhan sedemikian bukan hanya bersifat teknikal dan atas alasan itu telah tidak menghiraukan keterangan tersebut. Perayu-perayu tersebut telah merayu dan isu-isu utama yang timbul adalah:

(1) Samada keterangan yang dipersoalkan, dalam keadaan yang sedemikian, telah memeranjatkan responden atau dalam apa cara pun telah memudaratkan, mengelirukan atau memalukan responden.

(2) Samada keterangan yang dipersoalkan merupakan penyimpangan yang radikal daripada pliding-pliding atau samada ianya hanya semata-mata satu perubahan, ubahsuaian atau perkembangan apa yang telah dikatakan dalam pliding tersebut.

(3) Samada dengan membenarkan perayu-perayu tersebut mengemukakan keterangan tanpa apa-apa bantahan sehingga ke peringkat yang sebegitu lewat dan tidak membantah kepada keterangan tersebut apabila keterangan itu terbit, responden dianggapkan sebagai telah mengenepikan pengakuan secara salah terhadap keterangan yang sedemikian.

Diputuskan:

[1] Adalah tidak memadai bagi perayu-perayu untuk hanya memplidkan satu penafian tentang perolehan hak-hak adat anak watan sepertimana yang dituntut oleh responden tanpa menyatakan alasan-alasannya. Kedua-dua pembelaan yang dikatakan, yang mana telah ditimbulkan oleh perayu dalam keterangan di perbicaraan, yang merupakan fakta-fakta material, dalam keadaan kes ini, seharusnya hendak diplidkan dan kegagalan untuk berbuat sedemikian akan menjadikan keterangan mereka itu boleh dibantah atas pilihan responden.

[2] Aturannya adalah bahawa jika sesuatu pihak menjadi terkejut oleh keterangan yang dihasilkan daripada fakta-fakta material yang telah diplidkan, beliau mestilah membantah pada waktu dan saat itu juga apabila keterangan yang sedemikian terbit, agar keterangan yang sedemikian tidak dihiraukan oleh Mahkamah. Ianya menjadi terlewat apabila keterangan itu dibantah kemudiannya, sepertimana dalam penghujahan muktamad pada kesimpulan keterangan tersebut, sepertimana yang berlaku dalam kes semasa ini. Penerimaan oleh Mahkamah bagi bantahan lewat yang sedemikian akan mengakibatkan pihak yang mengemukakan keterangan yang sedemikian menghadapi risiko yang besar kemungkinan ianya akan dinafikan kebenaran untuk meminda plidingnya yang dipersoalkan di peringkat itu.

[3] Responden dengan kegagalan untuk membantah pada waktunya, tidak boleh dikatakan telah terkejut, atau dimudaratkan, dikelirukan atau dimalukan oleh keterangan perayu. Persuratan antara pihak-pihak tersebut juga menunjukkan bahawa tanpa menghiraukan penafian tidak berasas tersebut, responden adalah mengetahui tentang sifat pembelaan tersebut. Jika mereka benar-benar berasa ragu-ragu mereka sepatutnya meminta butir-butir yang selanjutnya dan lebih baik di bawah A. 8 k. 12 KMT. Hakikat bahawa mereka memilih untuk meneruskan pembicaraan tanpa ikhtiar yang sedemikian menunjukkan bahawa mereka tidak dimudaratkan atau terkejut oleh keterangan yang lebih spesifik yang telah ditimbulkan oleh perayu di perbicaraan tersebut.

[4] Keterangan yang sedemikian apabila diberikan tanpa bantahan oleh pihak yang membantah akan selanjutnya mempunyai kesan untuk memulihkan ketiadaan rayuan yang sedemikian dalam pliding yang relevan dengan cara penepian kecuali keterangan itu mewakili penyimpangan yang radikal daripada pliding dan bukannya hanya satu perubahan, ubahsuaian atau perkembangan apa yang telah dikatakan dalamnya. Dalam rayuan semasa ini keterangan yang menjadi isu bukannya satu penyimpangan radikal yang sedemikian tetapi hanya perkembangan dari apa yang telah dikatakan oleh defendan. Didapati bahawa responden dengan membenarkan perayu-perayu memberi keterangan yang dipersoalkan tanpa sebarang bantahan sehingga ke peringkat sedemikian lewat, tentunya dianggapkan telah mengenepikan pengakuan yang salah terhadap keterangan yang sedemikian.

[5] Apa yang patut ditanya oleh Mahkamah bawah bilamana responden gagal untuk membantah apabila keterangan yang dipersoalkan itu dikemukakan adalah samada keterangan tersebut adalah satu penyimpangan radikal dari pliding tersebut atau ianya satu perubahan, ubahsuaian ataupun perkembangannya. Walaubagaimanapun dengan penolakan Tuan Hakim yang bijaksana untuk mempertimbangkan kesemua keterangan berhubung dengan kedua-dua pembelaan yang dikatakan itu, Mahkamah ini dilucut dari peluang mempertimbangkan keputusan Tuan Hakim yang bijaksana dan

alasan-alasan akibatnya ke atas pembelaan-pembelaan yang dikatakan. Oleh kerana pembelaan-pembelaan yang dikatakan itu tidak jelas, maka satu perbicaraan dengan itu menjadi perlu.

[Rayuan dibenarkan. Perintah sehubungannya].

Cases referred to:
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113 ***(refd)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(refd)***
Siti Aishah bt Ibrahim v. Goh Cheng Hwai [1982] 2 MLJ 124 ***(refd)***
Baerlein v. Chartered Mercantile Bank [1895] Ch D 488 ***(refd)***
Ang Koon Kau & Anor. v. Lau Piang Ngong [1984] 2 MLJ 277 ***(foll)***
Waghorn v. George Wimpey & Co. Ltd. [1969] 1 WLR 1764 ***(cit)***
John Stein & Co. Ltd. v. O'Hanlon [1965] AC 890 ***(cit)***

Legislation referred to:
Land Code (Sarawak)
Rules of the High Court 1980, O. 8 r. 12, O. 18, rr. 7(1), 8(1)(a), (b), (c)

For the appellants - Abdul Halim bin Haji Sabil, Federal Counsel
For the respondents - M.S. Sandhu; M/s. M.S. Sandhu & Co.

JUDGMENT

Peh Swee Chin SCJ:
A small point of practice and procedure relating to evidence at variance with or departing from pleading arises in this appeal and though there is no dearth of authority on it, application of the relevant principles seems to have frequently given rise to some difficulty as in this appeal; further, we feel we ought to give our reasons for differing from an otherwise well-reasoned judgment of the learned trial Judge.

For reasons which will become apparent later, only a very brief summary of the facts in this case will be given.

The seven respondents, (hereafter the plaintiffs), have all claimed to have acquired native customary rights in certain allegedly state lands at Kampong Dagang, Miri, Sarawak, by virtue of Sarawak's Land Code. Because of the entry of the appellants upon their respective lands and the demolition of their houses thereon by the appellants, they now claim an injunction to restrain the appellants from building on the respective lands and damages, etc.

Both appellants (hereafter the defendants), in each of their respective defence deny the allegation that plaintiffs have acquired such native customary rights but admit their entry of their respective lands alleged to have been acquired by native customary rights and the demolition of the houses thereon.

It will have been noticed that there is a denial by the defendants of such alleged native customary rights without further particulars as to any reason for such mere denial.

At the trial, one of the reasons for their denial of such allegations of native customary rights, (apart from their requiring strict proof of such rights), by virtue of certain section in the said Land Code, was that the said lands were situated within a river bank reserve on which no one could claim any title thereon by virtue of the said Land Code. Yet another reason was that the said lands had allegedly belonged to Sarawak Shell Oil Ltd. at one time.

It was only in the final submission after the conclusion of all evidence that an objection was raised by the plaintiffs for the first time that such defences were not pleaded. Learned Counsel for the plaintiffs argued before the learned trial Judge in his final submission that such defences were not pleaded and such evidence ought to be disregarded for "the defendants sought to establish facts which would provide them with a complete defence in law". To this the learned trial Judge agreed holding that the appellants were in breach of O. 18 r. 7(1) of the Rules of the High Court 1980 which are set out as follows:

> 7(1) Subject to the provisions of this rule and rr. 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
>
> 8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the proceeding pleading.

The learned trial Judge by way of emphasis, underlined r. 8(1)(b) above. His Lordship relied on *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113 and *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 and held that the non-compliance under O. 18 was not merely technical, and such alleged defences, (and it goes without saying that evidence adduced thereon) would be totally disregarded.

What is of importance to bear in mind is that evidence bearing on these two defences was not objected to at all as regards their inadminisibility on account of its departure from the defence of the defendants as and when such evidence emerged or was adduced. It emerged as early as during the cross-examination of PW1, (and there were nine witnesses called for the plaintiffs), and in fact the first question in such cross-examination that was asked of PW1 was about the distance of his house from the river bank.

By O. 18 r. 7(1), a pleading must contain only a statement, in summary form, of material facts but not the evidence by which these facts are to be proved.

Are these two alleged defences material facts which ought to be pleaded? We think they are, and on this, we agree with the learned trial Judge.

A legal result or conclusion of law on facts proved before a Court is generally not pleaded but only material facts which would lead to such a result or conclusion. When it comes to a defendant, e.g. it is not for him to say that he is not liable e.g. for a sum claimed, he must also plead when available, e.g. that the goods were never delivered, or that he has been mistaken for another buyer with a similar name etc. To say merely that he is not liable for the sum claimed is a legal result, which should not, strictly speaking have been pleaded but only stated in the prayers to the defence, in the form that claim be dismissed, though it is a normally acceptable and harmless harbinger of some material facts to follow by way of defence.

In the instant case, the defendants merely pleaded a denial of the acquisition of native customary rights claimed by the plaintiffs. This is not enough. They would have to say why; failure to do would make any evidence of the reason for the denial objectionable at the option of the plaintiffs.

The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarass or mislead the opposing party.

If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the Court, and the Court will then uphold such timely objection. The Court will generally however grant an adjournment if requested, on suitable terms as to costs etc. for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a Court trial, not a chaotic harangue in a market place.

A party is not taken by surprise when the circumstances actually indicate so, e.g. when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence then and there as this Court now seeks to emphasize.

Thus when a plaintiff stated in her pleading that she was "lawfully walking along the proper side of the road", when in evidence, she said she was crossing the road when no vehicles were in sight, it was held by the Federal Court that that was not fatal to her claim when the defendant was not taken by surprise because the fact of her walking across the road was pleaded by the defendant in the defence and relied on at the very outset. Please see *Siti Aishah bt Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124.

We next deal with the fact that such evidence was not objected to timeously as being inadmissible on account of its being at variance with pleading.

Generally in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a Court without such consent also, please see *Baerlein v. Chartered Mercantile*

Bank [1895] Ch D 488; similarly with technical rules of procedure. Therefore when such evidence represents a departure from pleading, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence as in the instant appeal. In these circumstances, the party facing such evidence at variance from pleading, by failing to object cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such objection raised at the stage of final submission being accepted by the Court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleading in question at that stage.

Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by Federal Court in *Ang Koon Kau & Anor. v. Lau Piang Ngong* [1984] 2 MLJ 277, FC at page 278:

> Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.

There is however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleading, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v. George Wimpey & Co. Ltd*. [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor. v. Lau Piang Ngong, supra,* and *John Stein & Co. Ltd. v. O'Hanlon* [1965] AC 890.

Therefore a Court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleading is deemed to be waived and the defect in such pleading cured.

In the instant appeal, evidence bearing on the two alleged defences is not such a radical departure but a mere development of what has been alleged by the defendants. Such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.

Not having been taken by surprise by the evidence in question is not only indicated by the failure to object to such evidence as and when it was adduced. It is in any event, actually indicated also by the following circumstances in this case.

The generalized defence in question must have appeared to the plaintiffs to be equivocal, but through some correspondence between the parties, they must have been aware of the nature of the defence. If they were really in doubt, they could have resorted to asking for further and better particulars under O. 8 r. 12 of the Rules of the High Court. The fact that they chose to proceed with the hearing without taking such initiative shows they were in no way prejudiced or surprised by the more specific evidence raised by the defendants at the hearing.

With the learned trial Judge declining to consider at all, the evidence bearing on the two alleged defences, we are deprived of an opportunity of considering, on appeal here, the learned trial Judge's conclusion and the reasons therefor on such alleged defences which would have been available to us had the evidence on such alleged defences not been excluded by the lower Court as such alleged defences being by no means shadowy ones, a retrial would therefore be necessary. If we order costs against the plaintiffs in this connection, such costs may probably disable financially the plaintiffs from proceeding with the retrial, they having not been people of substance; therefore an appropriate order would have to be made.

We therefore allow the appeal, setting aside the judgment of the lower Court. We further order a retrial of all the consolidated cases concerned herein in this appeal before another Judge and that an early date of hearing be fixed. The respondents are to pay costs here and below but the payment of all such costs be deferred until the conclusion of the retrial, and any final appeal therefrom, if any.